(6)

No. 91-502

IN THE
Supreme Court of the United States
OCTOBER TERM, 1991

THE PUBLIC UTILITIES COMMISSION OF THE STATE OF CALIFORNIA, PATRICIA M. ECKERT, G. MITCHELL WILK, JOHN B. OHANIAN, DANIEL WM. FESSLER, NORMAN D. SHUMWAY, NEAL J. SHULMAN, and WILLIAM R. SCHULTE,
Petitioners,

vs.

FEDERAL EXPRESS CORPORATION,
Respondent.

PETITION FOR WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

MOTION FOR LEAVE TO FILE BRIEF *AMICUS CURIAE* AND BRIEF OF CALIFORNIA TRUCKING ASSOCIATION AS *AMICUS CURIAE* IN SUPPORT OF PETITIONERS

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Petitioners,
vs.
FEDERAL EXPRESS CORPORATION,
Respondent.

MOTION FOR LEAVE TO FILE BRIEF *AMICUS CURIAE*

The California Trucking Association respectfully moves for leave to file the accompanying brief as *amicus curiae* in support of petitioners, The Public Utilities Commission of the State of California ("CPUC"), Patricia M. Eckert, G. Mitchell Wilk, John B. Ohanian, Daniel Wm. Fessler, Norman D. Shumway, Neal J. Shulman, and William R. Schulte. The individual petitioners are the Commissioners of the CPUC and its Executive Director and Director of the Transportation Division. The petitioners have consented to the filing of this brief, but the respondent, Federal Express Corporation, has not.

The California Trucking Association ("CTA") is comprised of approximately 2,000 trucking companies, most

of which are regulated by the California Public Utilities Commission. Members of the CTA, along with all other state-regulated trucking companies in California, are subject to the comprehensive requirements of the California Public Utilities Code and the regulations of the CPUC. In addition, these regulated carriers are required to pay the Transportation Rate Fund Fee, now one-half of one percent of gross operating revenue, that is used almost exclusively to fund the regulatory and trucking safety program of the CPUC. As a result of this regulation which is applied uniformly to the trucking companies providing intrastate service in California, the carriers compete for business on an equal basis from a regulatory standpoint.

However, the Ninth Circuit has improperly destroyed this regulatory equality as to one intrastate motor carrier solely because that motor carrier also happens to be an air carrier. By extending the federal preemption in Section 105 of the Airline Deregulation Act, 49 U.S.C. App. § 1305(a)(1), which was intended to apply only to the rates, routes or services involved in the air operation, the Ninth Circuit has immunized the intrastate ground service of Federal Express Corporation ("Federal Express"), the same type service provided by thousands of other regulated California carriers, from California trucking regulation. This decision has improperly invaded the authority specifically reserved by Congress to the states. But of foremost importance to the *amicus* is that its member carriers are faced with an insurmountable competitive disadvantage in the same market served by Federal Express, which (under the Ninth Circuit decision) need not bear the cost of regulation and can adjust

its rates at will and without Commission restraint in order to secure the customers of regulated carriers.

The interest of the CPUC in this proceeding is quite different from the interest of the *amicus curiae*. The Commission, as an agency of the state, is attempting to enforce the California constitution and the California laws governing intrastate motor carriers. On the other hand, the regulated truckers in California are seeking to preserve their ability to compete against an unregulated, mammoth company.

It is respectfully submitted that the attached brief *amicus curiae* of the CTA in support of the petition for writ of certiorari will provide the Court with additional insight into the applicability of the federal preemption to the facts of this case. The interests of the CTA and its members would not otherwise be adequately presented by the parties to this case.

For the foregoing reasons, CTA respectfully requests that the Court grant it leave to file the attached brief *amicus curiae*.

Dated: November 21, 1991.

Respectfully submitted,

JOHN C. RUSSELL
Counsel of Record

RUSSELL, HANCOCK
& JEFFRIES
Attorneys for Amicus Curiae
California Trucking Assoc.

QUESTIONS PRESENTED

1. When Congress preempted state regulation "relating to rates, routes, or service of any air carrier," did it also preempt uniform state regulation of intrastate ground transportation of packages which had never been carried by air when the trucker also happens to be an "air carrier?"

2. Has Congress preserved the power of the states to regulate the intrastate ground transportation of packages but at the same time prohibited those states from regulating that same intrastate ground transportation of packages when the trucker also happens to be an "air carrier," thereby giving that trucker an unfair competitive advantage in providing intrastate ground transportation?

TABLE OF CONTENTS

TABLE OF AUTHORITIES

Page

Cases

Page

State Statutes

Federal Statutes

Legislative History

No. 91-502

In The
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October Term, 1991

THE PUBLIC UTILITIES COMMISSION OF THE STATE OF CALIFORNIA, PATRICIA M. ECKERT, G. MITCHELL WILK, JOHN B. OHANIAN, DANIEL WM. FESSLER, NORMAN D. SHUMWAY, NEAL J. SHULMAN, and WILLIAM R. SCHULTE,
Petitioners,
vs.
FEDERAL EXPRESS CORPORATION,
Respondent.

BRIEF OF CALIFORNIA TRUCKING ASSOCIATION AS *AMICUS CURIAE* IN SUPPORT OF PETITIONERS

The California Trucking Association ("CTA"), comprised of approximately 2,000 trucking companies most of which are regulated by the California Public Utilities Commission, as *amicus curiae*, submits this brief in support of the petition for certiorari filed by The Public Utilities Commission of the State of California, Patricia M. Eckert, G. Mitchell Wilk, John B. Ohanian, Daniel Wm. Fessler, Norman D. Shumway, Neal J. Shulman, and William R. Schulte, and urges that the petition for certiorari be granted so that the Court may review on the

merits this case, involving important federal-state issues, which was decided improperly and erroneously by the United States Court of Appeals for the Ninth Circuit. *Federal Express Corporation v. California Public Utilities Commission*, 936 F.2d 1075 (9th Cir. 1991).

INTERESTS OF THE *AMICUS CURIAE*

The California Trucking Association was chartered in 1934 for the purpose of stimulating and improving the trucking industry in the State of California and providing benefits for its members. It is recognized as the statewide association representing the trucking industry in California. Most members of the CTA have operating authority of some sort issued by either the California Public Utilities Commission ("CPUC") or the Interstate Commerce Commission to provide service between points in California. Many of its members have both intrastate California and interstate operating authority.

CTA members have secured their California operating rights either after initial application proceedings, some of which were lengthy and included vigorous opposition, or by acquisition from previously authorized trucking operators. Many member-carriers have a substantial investment in the California rights under which they operate. Since members of the CTA are subject to the jurisdiction of the CPUC, they operate under the California Public Utilities Code and CPUC regulations and pay California transportation rate fund fees based upon intrastate revenue to support California's regulatory program for the trucking industry. For the Fiscal Year 1991-1992, the transportation rate fund fee is one-half of one percent of gross operating revenue. CTA members provide service under tariffs or rate schedules containing rates approved by the Commission.

The Ninth Circuit has improperly ruled that the purely intrastate ground trucking operations of Federal Express Corporation ("Federal Express") in California — the same business conducted by the majority of the 2,000 members of the CTA — is exempt from any economic regulation by the CPUC under the federal preemption of 49 U.S.C. App. § 1305(a)(1) merely because Federal Express is also an air carrier. Federal Express is one of the largest transportation companies in the country, having transported 21 million packages systemwide in July 1988. Of these, approximately 850,000 packages moved wholly between points in California, either by a combination of air and ground movements, or solely by ground with no air transportation involved whatsoever (App. F, p. 2).[1] Federal Express operates one of the largest fleets of trucks in California.

Not only does the Ninth Circuit decision exempt from regulation existing intrastate trucking of Federal Express in California, but it will exempt any California ground transportation Federal Express wishes to provide. If the decision is permitted to stand, Federal Express will operate without California operating authority; may make individual rate agreements with shippers, without any requirement for Commission approval, undercutting the Commission-regulated rates of existing California truckers; may discriminate in rate charges to favored shippers; will not incur the additional costs of regulated truckers; and otherwise will have a decisive competitive advantage over other truckers. Federal Express is able to engage in unregulated California service with an insurmountable competitive advantage. The "level playing field" resulting from the uniformly applied state

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[1] Record reference here is to the Appendix to the petition for writ of certiorari.

trucking regulation is no longer applicable to Federal Express solely because it also operates as an air carrier.

All members of the CTA will be irreparably harmed and will incur competitive losses to an unregulated Federal Express which may very well become an unregulated trucking behemoth if the Ninth Circuit decision is permitted to stand. This certainly was not the Congressional purpose in enacting Section 105(a)(1) of the Federal Aviation Act, 49 U.S.C. App. § 1305(a)(1).

The members of the CTA are critically affected by the Ninth Circuit decision and have a vital interest in having it overturned. The CTA is bringing the plight of its members to the attention of the Court in order to aid the Court in addressing the issues presented in the petition for certiorari.

SUMMARY OF ARGUMENT

Section 105(a)(1) of the Federal Aviation Act, 49 U.S.C. App. § 1305(a)(1), as applicable here, provides:

> "[N]o State or political subdivision thereof . . . shall enact or enforce any law, rule, regulation, standard, or other provision having the force and effect of law *relating to rates, routes, or services of any air carrier* having authority under title IV of this Act . . . to provide air transportation." (Emphasis added.)

The clear language of the Act, its legislative history and judicial interpretation of Section 105(a)(1) show beyond any doubt that the federal preemption precluding state regulation "relating to rates, routes or services of any air carrier" does not apply to the purely intrastate trucking

operations of a company that also happens to be an "air carrier."

Of most importance to the CTA, the Ninth Circuit decision gives a grossly unfair competitive advantage to Federal Express. The 2,000 members of the CTA and other carriers that provide the same California intrastate trucking service as Federal Express must comply with all California trucking laws and regulations and pay the fees assessed by the California Commission. All of this adds to the costs of existing carriers in providing service. In addition, Federal Express, without any Commission control whatsoever, can undercut the rates of California intrastate truckers to attract business. This substantial competitive advantage was surely never intended by Congress. This is further evidence that the federal preemption does not free the intrastate ground service of an air carrier from state regulation to the detriment of other truckers providing the same service who are not also air carriers.

ARGUMENT

I. THERE IS A PRESUMPTION AGAINST FINDING PREEMPTION OF STATE LAW IN A FIELD TRADITIONALLY OCCUPIED BY THE STATES

The regulation by the California Public Utilities Commission began more than 70 years ago and predates the federal regulation — commencing in 1935 — of the motor carrier industry. Under the federal Motor Carrier Act, the jurisdiction conferred upon the Interstate Commerce Commission does not "affect the power of a State to regulate intrastate transportation provided by a motor

carrier" and does not authorize the ICC "to prescribe or regulate a rate for intrastate transportation [of property] provided by a motor carrier." 49 U.S.C. § 10521(b)(1) and (2). And the jurisdiction of the ICC over transportation of property by a motor carrier "does not . . . allow a motor carrier [of property] to provide intrastate transportation on the highways of a State." 49 U.S.C. § 10521(b)(3). Congress intended to allow the continuance of the traditional state regulation of intrastate motor carrier operation.

The legislative history of the preemption of state regulation in Section 105(a)(1) of the Act, 49 U.S.C. App. § 1305(a)(1), establishes that the preemption in no way diminished the power of the states to regulate intrastate trucking. The advocates for the preemption recognized that deregulation of the airline industry contemplated by the Airline Deregulation Act of 1978 would eliminate federal regulatory control over most airline operations. There was fear that this absence of regulation would prompt the states to attempt to regulate in those areas previously occupied by the federal government. This potential entry by the individual states into regulation of areas previously under federal regulation has been referred to as "Balkanization" where the airline industry could be subject to each state's varying regulation in place of the prior federal regulation applicable nationwide.

The intended effect of Section 105(a)(1) was made clear by the Civil Aeronautics Board (Regulatory Reform in Air Transportation, Hearings before the Subcommittee on Aviation of the Senate Committee on Commerce, Science and Transportation, 95th Congress, 1st Session, Serial No. 95-10, 1977, p. 191):

> The new section 105 would incorporate into the statute various court

> decisions which hold that the Federal government has exclusive jurisdiction to regulate rates, routes, and service in interstate, overseas, and foreign air transportation. The Board supports this provision. It would only preclude state regulation which could frustrate the intent of Federal regulatory reform legislation by substituting state utility-type regulation for Federal regulation being loosened or withdrawn.

The following references to the federal preemption in the 1977 hearings on Regulatory Reform in Air Transportation before the Senate Subcommittee on Aviation of the Senate Committee on Commerce, Science and Transportation, 95th Congress, 1st Session, Serial No. 95-10, are also on point (at p. 621):

> [The preemption is to avoid] a chaotic condition of substituting state and local regulation for federal regulation to the extent that federal regulation does not exist and creating a potential overlap and conflict where both the CAB and a state or locality seek to regulate the same subject matter.

and (at page 1164):

> [MR. GINTHER]: That was certainly the intent behind the provision in the Kennedy-Cannon bill to in effect maintain status quo but also to make sure that such States as Pennsylvania, for example, could not regulate

> interstate activities of federally certified carriers.

and (at page 1990):

> We understand the object of the provision to be the prevention of states expanding their air transportation regulatory activities at the same time that Federal Regulations are being loosened. . . .

The Fifth Circuit in *Trans World Airlines v. Mattox*, 897 F.2d 773 (5th Cir. 1990), *cert. denied*, 111 S.Ct. 307 (1990), *cert. pending*, Nos. 90-1604 and 90-1606, recognized the possibility of Balkanization with federal deregulation by pointing out certain legislative history of the 1978 Deregulation Act:

> The Sunset provisions of the 1978 Deregulation Act did not deal with the authority to protect consumers and to prevent unfair competitive practices. H.R.Rep. No. 793 at 3; 1987 U.S. Code Cong. & Admin. News at 2859. The Committee concluded that this important authority should be continued and should be exercised by DOT. H.R.Rep. No. 793 at 4-6; 1987 U.S. Code Cong. & Admin. News at 2860-62. The following passages in the report are of particular interest:
>
> > In addition to protecting consumers, federal regulation insures a uniform system of regulation and preempts regulation by the states. If there was no Federal regulation, the states might begin

> to regulate these areas, and the regulations could vary from state to state. This would be confusing and burdensome to airline passengers, as well as to the airlines.

And the First Circuit, in *New England Legal Foundation v. Massachusetts Port Auth.*, 883 F.2d 157, 173 (1st Cir. 1989), stated:

> In reducing federal economic regulation of the field to allow the forces of free competition to rule the marketplace, Congress obviously did not intend to leave a vacuum to be filled by the Balkanizing forces of state and local regulation. Congress expressly preempted state and local regulation by enacting § 105(a). . . .

Congress made clear that by including the express preemption of Section 105 in the Deregulation Act, it did not intend for the states thereafter to enact economic regulation to take the place of the federal regulation being terminated. *Trans World Airlines v. Mattox, supra*, 897 F.2d at 787.

Since the federal government has at all times permitted the states to exercise economic control over purely intrastate trucking, 49 U.S.C. § 10521(b)(1) and (2), the continued jurisdiction of the states in this activity could in no way fill a void left by federal deregulation. It is clear that this state regulation was unaffected by the federal preemption in Section 105.

Further evidence of the continued validity of state regulation, even though the intrastate trucking is conducted by an air carrier, is the fact that in 1987, Section

105(a)(1) of the Act was amended so that the preemption clause would apply to "air transportation" rather than "interstate air transportation." This extension of the preemption to all air transportation instead of only interstate air transportation clearly evidences the intent of Congress to make the preemption applicable to intrastate air transportation. Congress stopped short of extending the preemption to intrastate *ground* transportation service provided by an air carrier.

Where state regulatory powers are challenged, courts must presume that state laws are not preempted unless preemption is shown to be the clear purpose of Congress. *See, e.g., Pacific Legal Foundation v. State Energy Resources Conservation and Development Commission*, 659 F.2d 903, 919 (9th Cir. 1981), *aff'd sub nom. Pacific Gas & Electric Co. v. Energy Resources Commision*, 461 U.S. 190, 206 (1983). (Courts assume that states' police power takes precedence unless Congress clearly demonstrates a contrary intent.) The presumption against preemption of state regulation and in favor of state sovereignty is strong, to be rebutted only upon a clear showing that federal preemption is the clear and manifest intent and purpose of Congress. *Pacific Gas & Electric Co. v. Energy Resources Commission*, 461 U.S. 190, 205 (1983) (There is the assumption that the historic police powers of the states were not to be superseded by federal legislation unless that was the clear and manifest purpose of Congress.); *Siuslaw Concrete Const. v. Washington Department of Transportation*, 784 F.2d 952, 958 (9th Cir. 1986). The decision of the Ninth Circuit has unduly expanded the preemption of Section 105(a)(1) and ignored the presumption against federal preemption in the traditional state law area of economic regulation of intrastate trucking.

II. THE ESCAPE OF FEDERAL EXPRESS FROM CALIFORNIA REGULATION OF ITS INTRASTATE TRUCKING BUSINESS IS GROSSLY UNFAIR TO OTHER CALIFORNIA TRUCKERS

Federal Express complains that California regulation of its intrastate trucking activity will be burdensome to it in the following regards:

1. Federal Express may not reduce rates to meet competition without showing that the reduced rates are cost justified and Federal Express cannot make such a showing (A-2).[2]

2. Regulations for reducing tariff rates "prevent Federal Express from competing by attempting to get new business from our competitors. Preventing Federal Express from competing and attempting to obtain business presently handled by other carriers in California will affect our ability to grow, become more profitable. . . ." (A-4).

3. Federal Express has not cost justified its volume discounts to the Commission and they have not been approved (A-2).

4. Cost justification of rates would divulge Federal Express' trade secrets concerning costs, deliveries, wage rates, *etc.* (A-4).

5. Federal Express' rates are not related to distance and violate Commission rules and regulations (A-2).

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[2] References hereinafter are to the included Appendix.

6. The refund policy is an illegal rebate under Commission rules and regulations (A-2).

7. Federal Express objects to the requirement that it file with the Commission all contracts with customers and offer the same discount and same price or service arrangement to all customers who are similarly situated (A-4).

8. Federal Express would have to determine which shipments are California intrastate ground as distinguished from air and interstate shipments (A-11).

9. Federal Express would have to change its shipping documentation to comply with California regulations (A-12).

10. There will be an increased cost to comply with California requirements and this will increase rates to customers and reduce Federal Express' profitability (A-12, 13).

11. Implementing the California rules for handling claims would be an added expense to Federal Express (A-14).

12. Federal Express would have to comply with the Commission's requirement for record retention (A-8).

13. Federal Express would have to comply with the Commission's requirement that customers pay freight bills in seven days (A-5, 6).

14. Federal Express is required to file tariffs showing rates for intrastate trucking operations (A-2; A-8).

15. Intrastate truckers in California must file quarterly reports of gross intrastate operating revenue and pay a fee which, for the fiscal year 1989-90, amounted to two-tenths of one percent of gross operating revenue. Federal Express has refused to pay this fee (A-11). (The Transportation Rate Fund Fee is now one-half of one

percent of gross operating revenue. Cal. West's Ann. Pub. Util. Code § 5003.2.)

These are examples of requirements that the California Commission has imposed on every trucker, including Federal Express, for its intrastate trucking operations in California.

The CTA is not contending in any way that all of the requirements of the California Commission are appropriate or necessary in the present day business world. In fact, on various occasions, the CTA and its members have either sought to change the regulations or be relieved from their application. But the fact remains that these requirements exist and, in the absence of a variance or other relief, all intrastate carriers must comply with them and bear the expense of doing so. However, Federal Express cavalierly contends that these same requirements should not apply to its intrastate truck operations which, it admits, compete with other carriers. (The California regulations "prevent Federal Express from competing by attempting to get new business from our competitors" (A-4).)

The funding that underwrites the California Commission's carrier regulation program is derived almost exclusively from the quarterly operating fees paid by the carriers themselves. Cal. West's Ann. Pub. Util. Code §§ 5001-5011. Approximately 23,000 quarterly report forms for determining these fees are sent to California intrastate carriers, many of which are members of the CTA (A-11). Allowing Federal Express to avoid payment results in proportionately larger payments from other carriers and allows Federal Express to be the beneficiary of the regulatory order established by the Commission in California without paying its fair share for that benefit.

Members of the CTA and other regulated intrastate carriers in California cannot compete with the unregulated intrastate trucking service of Federal Express which does not bear the added cost of California regulation and which is under no regulatory restraint to prevent it from undercutting rates to steal customers from carriers which must comply with Commission requirements.

The Declaration of Policy of the Airline Deregulation Act of 1978, as amended, provides that the following, among other things, are in the public interest and in accordance with the public convenience and necessity (49 U.S.C. App. § 1302(a)):

> (7) The prevention of unfair, deceptive, predatory, or anticompetitive practices in air transportation, and the avoidance of —
>
> (A) unreasonable industry concentration, excessive market domination, and monopoly power; and
>
> (B) other conditions;
>
> that would tend to allow one or more air carriers unreasonably to increase prices, reduce services, or exclude competition in air transportation.

In addition to the above, the following, among other things, is considered to be in the public interest in respect to all-cargo air service (49 U.S.C. App. § 1302(b)):

> (3) The provision of services without unjust discriminations, undue preferences or advantages, unfair or deceptive practices, or predatory pricing.

It is clear that one of the main purposes of the Airline Deregulation Act is to create an environment where all carriers are able to compete for business on an equal basis without any unfair, anticompetitive practices. The fact that Congress has gone to special lengths to preclude anticompetitive practices in the Act is clear evidence that Congress did not intend that the federal preemption section of the same Act, 49 U.S.C. App. § 1305(a)(1), would allow an intrastate trucker in California to have such a competitive advantage in the market merely because it was also an air carrier.

The dissenting opinion in the Ninth Circuit aptly recognizes the effect of applying the preemption to the intrastate ground operations of Federal Express (936 F.2d at 1081):

> [T]he majority's decision will free the trucking business of Federal Express from any state economic regulation. This will open the door for substantial increases in Federal Express's trucking business and give it a substantial competitive advantage over trucking companies that must comply with state regulation . . .

Congress never intended this effect.

CONCLUSION

The Ninth Circuit has improperly extended the federal preemption in the Act to intrastate trucking, an area of regulation which continues by federal statute to be reserved to the states. The Court failed to take into account that the purpose of preemption under the Airline Deregulation Act was to prevent states from enacting laws and regulations to fill the void left by the elimination of federal regulation. Its purpose was not to make inapplicable long-standing state regulation in an area which has never been subject to federal regulation.

The impact of the Ninth Circuit decision on existing regulated California intrastate carriers will be devastating where they are now compelled to compete with an unregulated carrier the size of Federal Express.

The Court should grant the petition for certiorari filed by the California Public Utilities Commission and thereafter reverse the United States Court of Appeals for the Ninth Circuit.

Dated: November 21, 1991.

Respectfully submitted,

JOHN C. RUSSELL
Counsel of Record

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APPENDIX

CR 19, pp. 8-9

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UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF CALIFORNIA

FEDERAL EXPRESS CORPORATION,
Plaintiff,

v.

CALIFORNIA PUBLIC UTILITIES COMMISSION; STANLEY W. HULETT; DONALD VIAL; FREDERICK R. DUDA; JOHN B. OHANIAN; G. MICHAEL WILK; VICTOR WEISER and NORMAN KELLEY,
Defendants.

No. C 87 4891 MHP

AMENDED COMPLAINT FOR DECLARATORY AND INJUNCTIVE RELIEF (CONSTITUTIONALITY OF STATE REGULATION OF FEDERALLY CERTIFIED ALL CARGO AIR CARRIER)

Plaintiff FEDERAL EXPRESS CORPORATION ("FEDERAL EXPRESS") complains of the defendants as follows:

* * * * * * *

18. Plaintiff attempted to avoid the constitutional dispute and filed a tariff reflecting its nationwide rates with the PUC effective January 1, 1985. The tariff does not comply with the rules and regulations of the PUC because:

(a) Plaintiff's nationwide rates provide a guaranteed *refund* of charges if the package is not delivered on time or if package status information cannot be obtained within 30 minutes, and such promise is an illegal rebate under the PUC's rules and regulations;

(b) Plaintiff's nationwide rates provide a *volume discount* for its regular customers regardless of distance, whether the packages travel solely by aircraft, by aircraft and motor carrier, or solely by motor carrier, and regardless of destination in the United States, and such volume discount has not been cost-justified to the PUC;

(c) Plaintiff's nationwide *uniform rates* which depend upon the size and weight of each package, and not upon distance, violate the PUC's rule and regulations; and

(d) Under the PUC's rules and regulations, plaintiff may not reduce rates to meet competition without showing that the reduced rates are cost-justified, and plaintiff cannot make such a showing.

CR 46, Ex. 2, pp. 2-3

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UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF CALIFORNIA

FEDERAL EXPRESS CORPORATION,
Plaintiff,

v.

CALIFORNIA PUBLIC UTILITIES COMMISSION; STANLEY W. HULETT; DONALD VIAL; FREDERICK R. DUDA; JOHN B. OHANIAN; G. MICHAEL WILK; VICTOR WEISER and NORMAN KELLEY,
Defendants.

No. C 87 4891 MHP
DECLARATION OF LAURIE A. TUCKER

Laurie A. Tucker declares as follows:

1. I am the Manager of Pricing Analysis and Administration and Customer Automation and Invoicing for Federal Express Corporation ("Federal Express") . . . .

* * * * * * *

5. I have been advised that the California Public Utilities Commission (PUC) requires a regulated carrier to file all contracts with customers and offer the same discount and the same price or service arrangement to all customers who are similarly situated. Since all of our customers' contracts, discounts, service agreements, credit terms, etc., apply to shipments regardless of where made, each of those agreements would have to be filed with the Public Utilities Commission.

6. [A]ny requirement that we file cost justification for the price offered would divulge Federal Express' trade secrets concerning costs, deliveries, wage rates, etc.

7. I am told that if we wish to compete with a package carrier, we may not meet the rate being offered by that carrier if it is contained in a contract or contract rate schedule (General Order 147-A, Rule 7.5). I am also told that we will not be able to reduce a rate to meet the rate of a competing carrier unless we certify that we are already handling the traffic in question (Rule 7.5(c)(5)). These rules prevent Federal Express from competing by attempting to get new business from our competitors. Preventing Federal Express from competing and attempting to obtain business presently handled by other carriers in California will affect our ability to grow, become more profitable and provide better service to our customers throughout the United States. . . .

CR 46, Ex. 12, p. 2

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UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF CALIFORNIA

FEDERAL EXPRESS CORPORATION,
Plaintiff,

v.

CALIFORNIA PUBLIC UTILITIES COMMISSION; STANLEY W. HULETT; DONALD VIAL; FREDERICK R. DUDA; JOHN B. OHANIAN; G. MICHAEL WILK; VICTOR WEISER and NORMAN KELLEY,
Defendants.

No. C 87 4891 MHP
DECLARATION OF THOMAS L. McNEAL

Thomas L. McNeal declares that the following is true and correct.

1) I am employed as Managing Director, Treasury and Credit Operations of Federal Express Corporation ("Federal Express"). . . .

* * * * * * *

3) I have been advised that the California Public Utilities Commission (PUC) has issued a general order

which requires that all bills must be presented within 7 days from delivery and credit may only be extended for 7 days. If we were to impose those conditions upon our customers, it is my opinion that we would lose many of our customers because those credit conditions are far more stringent than presently exist in the market place. I cannot estimate the loss, but it would be substantial.

CR 72, Ex. 4F, pp. 3, 7

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UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF CALIFORNIA

FEDERAL EXPRESS CORPORATION,
Plaintiff,

v.

CALIFORNIA PUBLIC UTILITIES COMMISSION; STANLEY W. HULETT; DONALD VIAL; FREDERICK R. DUDA; JOHN B. OHANIAN; G. MICHAEL WILK; VICTOR WEISER and NORMAN KELLEY,
Defendants.

No. C 87 4891 MHP
DEFENDANTS' RESPONSES TO PLAINTIFF'S REQUESTS FOR ADMISSIONS

* * * * * * *

REQUEST NO. 3: Admit that even if the CPUC allows Federal Express to estimate the number of packages that have moved solely on the ground, solely within California after transportation of the packages, the CPUC would not relieve Federal Express from complying with PUC

General Order 155 requiring the retention of records in California for three years.

RESPONSE TO REQUEST NO. 3: While the mere fact that the CPUC allows Federal Express to estimate its volume of wholly intrastate ground traffic would not of itself nullify other CPUC requirements, it is very likely that Federal Express could obtain a variance from the requirement in General Order 155 regarding the retention of records in California for three years if that requirement were shown by plaintiff to be burdensome or detrimental to the Federal Express mode of operation.

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REQUEST NO. 9: Admit that even if the CPUC allows Federal Express to estimate the number of packages that have moved solely on the ground, solely within California after transportation of the packages the CPUC would not relieve Federal Express from complying with PUC General Order 80-B requiring the filing of tariffs showing all services, rates, and terms of carriage for all customers who ship packages from a point of origin in California to a destination in California.

RESPONSE TO REQUEST NO. 9: While the mere fact that the CPUC allows Federal Express to estimate its volume of wholly intrastate ground traffic would not of itself nullify other CPUC requirements, it is very likely that Federal Express could obtain a variance from the requirement in General Order 80-B requiring the filing of tariffs showing all services, rates and terms of carriage for all customers who ship packages from a point of origin in California to a destination in California if this requirement were shown by plaintiff to be burdensome or detrimental to the Federal Express mode of operation.

CR 72, Ex. 4H, pp. 2-3, 5-6, 7

BURDENS IMPOSED BY PUC ON INTERSTATE COMMERCE*

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* Excerpts from declarations by Federal Express employees previously filed.

WITNESS	BURDEN	EXCERPTS FROM DECLARATIONS
Laurie A. Tucker Manager of Pricing Analysis and Administration and Customer Automation and Invoicing Declaration of August 26, 1988	Loss of pricing flexibility for all customers.	¶ 7 I am told that if we wish to compete with a package carrier, we may not meet the rate being offered by that carrier if it is contained in a contract or contract rate schedule (General Order 147-A, Rule 7.5). I am also told that we will not be able to reduce a rate to meet the rate of a competing carrier unless we certify that we are already handling the traffic in question (Rule 7.5(c)(5)). These rules prevent Federal Express from competing by attempting to get new business from our competitors. Preventing Federal Express from competing and attempting to obtain business presently handled by other carriers in California will affect our ability to grow, become more profitable and provide better service to our customers throughout the United States. . . .

	Forcing interstate shippers to pay different California rates.	¶ 8 [W]e are unable to determine whether a package will be shipped wholly via aircraft, partially via aircraft and truck, or wholly via truck. Accordingly, the interstate [*sic*] rate required by the Public Utilities Commission will be charged for *all* interstate shipments, whether by air or by truck.
Doug Lawrence Manager of Information Air Systems Air/Ground Terminals and Transportation Declaration of August 25, 1988	Slowdown in package movement for interstate shippers to accommodate extra scanning.	¶ 5 There is no known system to permit Federal Express to determine whether a package which is received for shipment will be transported by truck or by air. Although Federal Express does not have the ability to determine, after transportation, which packages have been transported by truck, it is conceivable to scan trucks which are unloading to record which packages are in the truck. That scanning would add precious minutes to the time required to unload a truck. . . .

Gayle M. Christensen Managing Director of Servicing Marketing Declaration of August 26, 1988	Forcing interstate shippers to use California air-bills.	¶ 4 If we were required to be in compliance with the requirements of General Order 155, Federal Express would have to add the Federal Express phone number and CAL-T number to its air waybill. There is no room on the front of the air waybill, but these two numbers could be entered on the back of the air waybill on the shipper's and recipient's copy.
W. Bruce Allen Professor of Public policy and Management and Regional Science and Transportation at the Wharton School of the University of Pennsylvania; Director of the Wharton Transportation Program; Chairman of the Department of Public Policy and Management; Chairman of the Graduate group in Transportation	Increased national operating costs to comply with intra-state regulations.	¶ 8 I am also aware of the declarations indicating the changes necessary to the Federal Express accounting and billing procedures to comply with the PUC orders, and the added costs of attempting to comply with those orders. These are identifiable incremental costs. It is my understanding that there are other costs that are unknown at this time because they would be incurred jointly in both intrastate and interstate markets.

Declaration of August 26, 1988	Forcing interstate shippers to pay for higher costs incurred in California.	¶ 9 Any cost increases will be shared by Federal and its customers of both intrastate *and* interstate shipments. Federal's sales will fall and consumers will pay more for Federal service if the company is able to pass the cost increases onto consumers. Federal's profitability will be harmed as will its ability to compete to the extent it cannot pass on the cost increases.
Michael C. Shermer Managing Director of Risk Management Declaration of August 26, 1988	Requirement for interstate shippers to make written not telephone claims.	a) We do not require that claims be in writing, and it would greatly inconvenience our customers, especially commercial customers, to require that all claims be made in writing. . . .
Charles A. Germano Managing Director, Billing Services Support Declaration of August 25, 1988	Requirement for interstate shippers to file written refund claims, instead of making oral claims.	¶ 5 I am advised that the California Public Utilities Commission General Orders require the customer to file all such [refund] claims in writing, which claim must include the original air bill, the amount sought to be claimed and other pertinent information. . . .

Additional personnel and additional cost of $350,000 to process written claims from California shippers.

¶ 6 Creating such documentation would be an administrative burden upon our department. . . . We would obviously be required to create space to store such written documents. Also, if we were to require each claim to be in writing, create a file for each claim, and acknowledge each claim in writing, I believe we would be required to employ at least an additional 12 people in our department. . . .

CR 75, p. 2

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UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF CALIFORNIA

FEDERAL EXPRESS CORPORATION,
Plaintiff,

vs.

CALIFORNIA PUBLIC UTILITIES COMMISSION; STANLEY W. HULETT; DONALD VIAL; FREDERICK R. DUDA; JOHN B. OHANIAN; G. MICHAEL WILK; VICTOR WEISER and NORMAN KELLEY,
Defendants.

No. C 87 4891 MHP
AFFIDAVIT OF JAMES DIANI
IN SUPPORT OF MOTION FOR
SUMMARY JUDGMENT

STATE OF CALIFORNIA)
) ss.
CITY AND COUNTY OF)
SAN FRANCISCO)

JAMES DIANI, being first duly sworn, on oath deposes and says:

1. He is a supervisor in the Tariff and License Branch of the Transportation Division of the California Public Utility Commission ("CPUC").

* * * * * * *

3. The unit which he supervises in the Tariff and License Branch is responsible for collecting CPUC quarterly operating fees (also known as "Transportation Rate Fund Fees") from motor vehicle carriers operating in California.

4. Four times each year his unit mails out a "Quarterly Report of Gross Operating Revenues" to each California carrier and audits the returns. Approximately 23,000 of these quarterly report documents are mailed each quarter by his unit.

5. Pursuant to Section 5003.1(a) of the California Public Utilities Code, quarterly fees may be set each fiscal year at less than one-third of one percent of highway carriers' gross operating revenues. For non-exempt carriers, such as plaintiff, the current fee and the fee proposed for Fiscal Year 1989-90 is set at two-tenths of one percent of gross operating revenue.